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BANDARI SIMMA REALTY SDN BHD & ANOR v. RAVICHANTHIRAN GANESAN

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[CIVIL APPEAL NO: JA-12BNCVC-1-01-2020]
B 9 MARCH 2021

LEGAL PROFESSION: *Solicitor – Fees – Claim for outstanding legal fees – Solicitor commenced action as former partner of firm – Whether solicitor proper party to initiate suit – Whether there was privity of contract – Whether there was admission of liability on chargeable person's part – Failure to call material witness – Whether adverse inference ought to be invoked – Failure to deliver bill of costs to chargeable person before action could be commenced for recovery of costs – Whether solicitor had made demands from chargeable party for him to be in position to initiate suit – Whether case proved on balance of probabilities – Legal Profession Act 1976, s. 124*

The respondent ('plaintiff'), a former partner of Messrs Ravi Aida & Partners, commenced this action ('this suit') at the Sessions Court against the appellants ('defendants') for outstanding legal fees in the sum of RM247,500. The second and third defendants who were corporate advisers to one Tan Bon Kiat and his company AD Travels Sdn Bhd, had appointed Messrs Ravi Aida & Partners to provide legal services for Tan Bon Kiat. The third defendant was a former partner of the second defendant. The first defendant was a company operating for the family members of the third and fourth defendants, whilst the fourth defendant was the former finance manager of the second defendant, and a shareholder and director of the first defendant. The second and third defendants had agreed to settle the legal fees owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, and had obtained the money from the first defendant. In return, Tan Bon Kiat had purportedly agreed to transfer five units of a condominium to the first defendant to contra the payment for the legal fees that had been advanced by the first defendant to the second and third defendants. The plaintiff, however, had discontinued this suit against the second defendant since the second defendant had ceased to be in operation. On the day of the trial at the Sessions Court, the plaintiff had withdrawn/discontinued this suit against the third defendant. The case proceeded against the first and fourth defendants (collectively 'the defendants'), and the Sessions Court Judge ('SCJ') allowed the plaintiff's claim. As a result thereof, the defendants filed this appeal against the SCJ's decision. The issues that arose were (i) whether the plaintiff was the proper party to initiate this suit; (ii) whether there was admission of liability by the first defendant; (iii) whether there was privity of contract between the defendants and the plaintiff; (iv) whether an adverse inference should be drawn for failure of the plaintiff to call Tan Bon Kiat; (v) whether the plaintiff had made any demand from the defendants; and (vi) whether the plaintiff had proved his case on a balance of probabilities.

Held (allowing appeal with costs):

(1) It is trite law that partners have the alternative of joining all the partners as plaintiffs or by suing in the name of the firm. Since the partnership was no longer in existence, it was improper for this suit to be brought in the name of the partnership. The SCJ had referred to the *locus* of the plaintiff, but had not addressed her mind to the issue of whether the plaintiff, as a former partner of the defunct Messrs Ravi Aida & Partners, was in a position to initiate this suit against the defendants in his own name, without naming the other partner. As such, the decision of the SCJ in allowing the claim amounted to an appealable error, and on this ground alone, the plaintiff's claim should fail. (paras 16, 18 & 19)

(2) The plaintiff's case was based on a convoluted narrative linked to a separate suit ('Suit 197'). In Suit 197 (which the plaintiff was not a party to), the first defendant averred that the invoices issued by Messrs Ravi Aida & Partners to Tan Bon Kiat had already been settled by the second and third defendants using the money advanced by the first defendant. Hence, this suit by the plaintiff who claimed that the legal fees had not been settled. The plaintiff relied on purported admissions made by the first defendant in its statement of claim in Suit 197, and contended that as a result thereof, the first and fourth defendants were now liable to pay the plaintiff the legal fees owed to Messrs Ravi Aida & Partners by Tan Bon Kiat, which the second and third defendants had agreed to settle. The purported admissions that the plaintiff claimed had been made by the defendants, should have been assessed in light of the facts and circumstances of the case, particularly, since the first defendant's claim against Tan Bon Kiat was not decided on its merits, as it was struck out for failure of the first defendant to pay security of costs. As such, reliance by the SCJ on the pleadings in Suit 197, to conclude that the first defendant had admitted to legal fees owing by Tan Bon Kiat to Messrs Ravi Aida & Partners, which the second and third defendants had agreed to settle, rendering both the first and fourth defendants liable to the plaintiff in this suit, was an appealable error. (paras 20, 22, 27 & 28)

(3) The erroneous reliance by the SCJ on the pleadings in Suit 197, resulted in her failure to address the issue of privity of contract. Based on the principle that the doctrine of *jus quaesitum tertio* has no place in the law of contract, the SCJ had erred in concluding that the first and fourth defendants were liable to pay legal fees purportedly owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, and which the second and third defendants had agreed to settle. The SCJ should have determined the contractual relationship between the parties, bearing in mind that the first defendant appeared to be a third party funder, without any apparent connection or link to Tan Bon Kiat or his dealings with Messrs Ravi

Aida & Partners. Considering that such third party funding arrangements are not recognised in this country, the first defendant had no legal obligation to the plaintiff for the legal fees owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, which the second and third defendants had agreed to settle. The plaintiff had also discontinued/withdrawn his claims against the second and third defendants, leaving the remaining first and fourth defendants, who were strangers to the arrangement, as they were not parties to the arrangement between Messrs Ravi Aida & Partners on one hand and Tan Bon Kiat and the second and third defendants on the other. (paras 29-32)

(4) As far as the fourth defendant was concerned, the SCJ had erred in holding that she was liable in view of the fact that she was merely the finance manager of the second defendant, and shareholder and director of the first defendant. The plaintiff's claim against the fourth defendant was not based on actual fraud or some conduct amounting to fraud in equity, but on the mere fact that she was a shareholder and director of the first defendant, and a former employee of the second defendant. As such, the veil of incorporation of the first defendant remained intact, and could not be lifted to hold the fourth defendant liable. (paras 33 & 36)

(5) Bearing in mind that the common denominator in this suit and Suit 197 was Tan Bon Kiat, he would have been in a position to adduce the best evidence available, as he could have shed light on the amount owing, if any, to Messrs Ravi Aida & Partners. Tan Bon Kiat was material to the facts of the present case as he would have been able to lend credence to the narrative provided by the plaintiff in his statement of claim. There was no explanation proffered for the absence of Tan Bon Kiat, leading to the inference that there was deliberate withholding of the witness. As such, the failure to call Tan Bon Kiat resulted in the invocation of an adverse inference against the plaintiff. (paras 39, 42, 43 & 44)

(6) The importance of s. 124 of the Legal Profession Act 1976 ('LPA') is indisputable. It requires a bill of costs to be delivered to the chargeable person before an action can be commenced for the recovery of costs. In the present case, as admitted by the plaintiff himself, no such demand, as required by s. 124 of the LPA, had been made against the defendants. The plaintiff had not tendered any evidence, whether in the form of correspondence or otherwise, to show that invoices which purportedly contained the amount of legal fees owed, had been sent by Messrs Ravi Aida & Partners to the defendants, or that any reminder had been issued to the defendants for payment. Since no demand had been made, the plaintiff was not in a position to have initiated this suit against the defendants. (paras 49 & 50)

(7) Based on the Latin maxim *ei incumbit probatis qui dicit, non qui negat*, which means that the burden of proof is on the one who declares, not on the one who denies, the plaintiff had the legal burden to prove his case on a balance of probabilities. In the present case, the plaintiff was not in a position to initiate this suit in his name only, without naming his partner/s, and on that count, this suit was a non-starter. However, even on the assessment, evaluation and judicial appreciation of the evidence, the gaps left in the plaintiff's case rendered it one which had failed to reach the threshold of proof as required in a civil case. As such, the SCJ should have dismissed the plaintiff's claim. (paras 51 & 56)

Case(s) referred to:

Adel Muhd El-Dabbah v. AG of Palestine [1944] AC 156 ***(refd)***

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***

Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534 HC ***(refd)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***

Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd [2019] 1 LNS 1662 HC ***(refd)***

Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Leck Sing Trading Co v. Tan Kim Leng A [1978] 1 LNS 87 HC ***(refd)***

M K Varma & Anor v. K M Oli Mohamed [1950] 1 LNS 39 ***(refd)***

Marappan Muthusamy v. R Sivam Ramasamy [2013] 1 LNS 1381 CA ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Murphy v. Bower (1866) IR 2 CL 506 ***(refd)***

Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***

Re B [2008] UKHL 35 ***(refd)***

Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2012] 1 LNS 1116 HC ***(refd)***

Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals [2021] 2 CLJ 318 FC ***(refd)***

Tan Poh Yee v. Tan Boon Thien & Other Appeals [2017] 3 CLJ 569 CA ***(refd)***

Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor [2003] 1 LNS 178 HC ***(refd)***

The Pacific Bank Bhd v. Chan Peng Leong [1998] 2 CLJ 440 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Unsung Rasad v. PP [2019] 1 LNS 662 CA ***(refd)***
Watt or Thomas v. Thomas [1947] AC 487 ***(refd)***
Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors [1940] 1 LNS 119 HC ***(refd)***
Yam Kong Seng & Anor v. Yee Weng Kai [2014] 6 CLJ 285 FC ***(refd)***
Yau Jiok Hua v. Sykt Kilang Bata-Bata Chip Siah Sdn Bhd [1999] 1 CLJ 239 HC ***(refd)***
Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2011] 1 LNS 1853 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 31, 101, 102, 114
Legal Profession Act 1976, ss. 124, 128

For the appellants - Nadesh Baskaran & MK Saw; M/s Teo Saw & Partners
For the respondent - C Sivasankar & Aida Hassan; M/s G Ravi

[Editor's note: Appeal from Sessions Court; Civil Suit No: JA-A52NCVC-132-08-2017.]

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters JC:

Introduction

[1] This was an appeal ("this appeal") by the appellants against the decision of the learned Sessions Court Judge ("SCJ") on 15 January 2020, in allowing the respondent's claim. For ease of reference, the appellants and respondent will be referred to respectively as the defendants and plaintiff.

The Background Facts

[2] The plaintiff, a former partner of Messrs Ravi Aida & Partners, commenced this action ("this suit") at the Sessions Court against all four defendants, for outstanding legal fees in the sum of MYR274,500.

[3] The second and third defendants who were corporate advisers to one Tan Bon Kiat and his company AD Travels Sdn Bhd, had appointed Messrs Ravi Aida & Partners to provide legal services for Tan Bon Kiat. The third defendant is a former partner of the second defendant. The first defendant is a company operating for the family members of the third and fourth defendants, whilst the fourth defendant is the former finance manager of the second defendant, and a shareholder and director of the first defendant.

[4] The second and third defendants had agreed to settle the legal fees owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, and had obtained the money from the first defendant. In return, Tan Bon Kiat had purportedly agreed to transfer five units of condominium in Pelita Indah, Johor Bahru to the first defendant to contra the payment for the legal fees that had been advanced by the first defendant to the second and third defendants.

[5] The plaintiff, however, had discontinued this suit against the second defendant since the second defendant had ceased to be in operation, after the demise of its sole proprietor, one Mr Timothy Oliver Sylvester. On the day of trial at the Sessions Court, on 11 November 2019, the plaintiff had withdrawn/discontinued this suit against the third defendant.

[6] The case proceeded against the first and fourth defendants (collectively "the defendants"), and the learned SCJ allowed the plaintiff's claim. As a result thereof, the defendants filed this appeal, which was allowed for the following reasons.

The Applicable Law

[7] The starting point for an appellate court is the presumption that any decision appealed against is correct in every respect. Therefore, to succeed in this appeal, the defendants in the present case must convince this court that the decision appealed against is wrong; and if this court was not so convinced, this appeal would fail.

[8] This is because the findings of the trial judge who had the advantage of seeing, hearing, assessing and evaluating the witnesses, must be respected. An appellate court, therefore, should be cautious of upsetting the findings of the trial judge.

[9] I drew guidance from the following passage of Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] AC 487:

> (1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

[10] *Watt (or Thomas) v. Thomas* [1947] AC 487 has been assimilated into Malaysian jurisprudence through several cases including *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; and *Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd* [2019] 1 LNS 1662.

[11] However, this does not mean that the hands of the appellate court are tied. The exception to the general rule mentioned above is when the findings are clearly wrong: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517; or where crucial evidence has been misconstrued, or disregarded: *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; or if the trial judge is shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason, or to have drawn an inference from evidence which was equally capable of supporting a different inference, it then may be the duty of an appellate court to interfere: *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1940] 1 LNS 119; [1941] 1 MLJ 37.

[12] I found instructive also the case of *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909; [1998] 2 MLJ 463, where it was stated by Gopal Sri Ram JCA (as he then was) in the following passage:

> One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. *However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion*.
>
> (emphasis added)

[13] In *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58; [2017] 3 MLJ 763, the principles of appellate intervention were distilled by the Court of Appeal, through Harmindar Singh Dhaliwal JCA (now FCJ) in the following passages:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
>
> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v. Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509);
>
> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1);
>
> (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v. Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision see *Lee Ing Chin @ Lee Teck Seng v. Gan Yook Chin & Anor* [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see (*Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149).

Contentions, Evaluation, And Findings

Whether The Plaintiff Was The Proper Party To Initiate This Suit

[14] The preliminary question that arose was whether the plaintiff was entitled to commence this suit solely, on behalf of his now defunct partnership, that is, Messrs Ravi Aida & Partners, without the involvement of the only other remaining partner, one Aida Hassan.

[15] In my view, the learned SCJ, in concluding that the plaintiff had the necessary *locus* to initiate proceedings against the defendants, had not addressed her mind to the issue of whether one partner of a legal firm that had already been dissolved could maintain a suit on his own without naming the other remaining partner/s.

[16] It is trite law, based on the case of *M K Varma & Anor v. K M Oli Mohamed* [1950] 1 LNS 39; [1950] 1 MLJ 80 that partners have the alternative of joining all the partners as plaintiffs or by suing in the name of the firm. In this case, since the partnership was no longer in existence, it was improper for this suit to be brought in name of the partnership. (See *Leck Sing Trading Co v. Tan Kim Leng A* [1978] 1 LNS 87; [1979] 1 MLJ 274) Hence, this suit should have been initiated by all the partners, which were the plaintiff and Aida Hassan.

[17] The plaintiff contended that this issue was not canvassed at the Sessions Court and it was, therefore, inequitable to raise it at this stage. I had to disagree with this contention, in view of the following passage of the grounds of judgment of the learned SCJ which reads:

> Adalah fakta yang tidak dipertikaikan bahawa Plaintif merupakan rakan kongsi Tetuan Ravi Aida & Partners pada masa mantan yang material dan juga tidak dipertikaikan bahawa Plaintif dan Tetuan Ravi Aida & Partners telah dilantik oleh Defendan Kedua dan Ketiga untuk mewakili Dato' Tan Bon Kiat dan syarikatnya iaitu Syarikat AD Travel Sdn. Bhd. **Mahkamah ini berpendapat bahawa Plaintif mempunyai *locus* untuk membawa Tindakan ini** bagi pihak Tetuan Ravi Aida & Partners.
>
> (emphasis added)

[18] It was obvious that the learned SCJ had referred to the *locus* of the plaintiff, but had not addressed her mind to the issue of whether the plaintiff, as a former partner of the defunct Messrs Ravi Aida & Partners, was in a position to initiate this suit against the defendants in his own name, without naming the other partner.

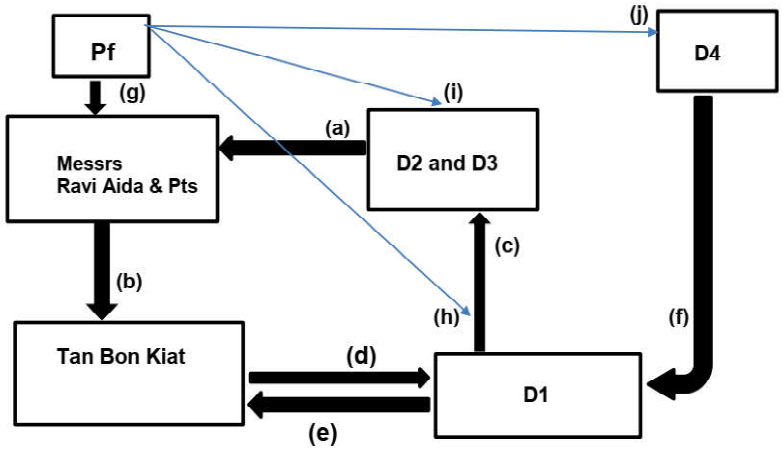
[19] As such, the decision of the learned SCJ in allowing the claim amounted to an appealable error, and on this ground alone, the plaintiff's claim should fail, and this appeal allowed. However, in the interest of completeness, the following issues were addressed.

Whether There Was An Admission Of Liability By The First Defendant

[20] The plaintiff's case was based on a convoluted narrative linked to a separate suit *vide* Civil Suit No. 22NCVC-197-11-2014 ("Suit 197"). In that suit (which the plaintiff was not a party to), the first defendant had brought an action against Tan Bon Kiat, claiming that Tan Bon Kiat had agreed to transfer five units of condominium in Pelita Indah, Johor Bahru to the first defendant to contra the payment that had been made by the first defendant to the second and third defendants, for settlement of Tan Bon Kiat's legal fees to Messrs Ravi Aida & Partners. In Suit 197, the first defendant averred that the invoices issued by Messrs Ravi Aida & Partners to Tan Bon Kiat had already been settled by the second and third defendants using the money advanced by the first defendant. Hence, this suit by the plaintiff who claimed that the legal fees had not been settled.

[21] The following Diagram A is produced for ease of reference:

Diagram A



Legend:

(a) The appointment of Messrs Ravi Aida & Partners by the second and third defendants and the agreement to pay Tan Bon Kiat's legal fees to Messrs Ravi Aida & Partners.

(b) Legal services provided from Messrs Ravi Aida & Partners to Tan Bon Kiat.

(c) First defendant's advancement of money to second and third defendants to pay legal fees owed by Tan Bon Kiat to Messrs Ravi Aida & Partners.

(d) Tan Bon Kiat's agreement to transfer property to the first defendant in return for the money advanced to the second and third defendants to pay legal fees to Messrs Ravi Aida & Partners.

(e) Suit 197 where the first defendant had brought an action against Tan Bon Kiat for failure to transfer the property.

(f) The fourth defendant's connection to the first defendant by virtue of her shareholding and directorship.

(g) Plaintiff former partner of Messrs Ravi Aida & Partners.

(h) Plaintiff's claim against first defendant in this suit.

(i) Plaintiff's claim against second and third defendants in this suit, which was discontinued.

(j) Plaintiff's claim against fourth defendant in this suit.

[22] Although the first defendant's claim against Tan Bon Kiat in Suit 197 had been struck out for the failure of the former to pay security of costs, the plaintiff in the present case, relied on purported admissions made by the first defendant in its statement of claim in Suit 197, and contended that as a result thereof, the first and fourth defendants were now liable to pay the plaintiff the legal fees owed to Messrs Ravi Aida & Partners by Tan Bon Kiat, which the second and third defendants had agreed to settle.

[23] The learned SCJ concluded that the defendants were in fact liable for the legal fees, based on admissions that the first defendant had made in paras. 5, 6, 7, and 8 of the statement of claim in Suit 197.

[24] This brings to the forefront the issue of admissibility of judicial admissions. I am mindful that judicial admissions are admissible to establish the liability of the litigant, in light of the law laid down in *Yam Kong Seng & Anor v. Yee Weng Kai* [2014] 6 CLJ 285 and *Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] 1 LNS 1853. However, a perusal of the relevant paragraphs of the statement of claim of the first defendant in Suit 197 indicated that there were no such admissions. In fact, all that the first defendant did was to explain the narrative, the basis for its claim against Tan Bon Kiat, the involvement of the second and third defendants, and the link to Messrs Ravi Aida & Partners.

[25] Furthermore, it is important to bear in mind that admissions are not conclusive proof of the facts stated therein, as stipulated in s. 31 of the Evidence Act 1950 ("Evidence Act"), which reads:

> Section 31 – Admissions not conclusive proof but may estop
>
> Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

[26] This reminder was administered by the Federal Court in *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* [2021] 2 CLJ 318, in the following passage:

> Furthermore, admissions under s. 31 of the Evidence Act 1950, "are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained". As explained in *M A Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73; [1970] 2 MLJ 183, and also *Randhir Singh Bhajnik Singh v. Sunildave Singh Parmar (The Administrator Of The Estate Of K Surjit Kaur Gean Kartar Singh (Deceased))* [2019] 6 CLJ 771; [2018] 7 AMR 237; [2018] 12 MLJ 166; **an admission "cannot be regarded as conclusive, and it is open to the person who made it to explain it away** ...". If it was not explained, then it may amount to evidence against the person by whom it was made.
>
> (emphasis added)

[27] The purported admissions that the plaintiff claimed had been made by the defendants, should have been assessed in light of the facts and circumstances of the case, particularly, since the first defendant's claim against Tan Bon Kiat was not decided on its merits, as it was struck out for failure of the first defendant to pay security of costs.

[28] As such, reliance by the learned SCJ on the pleadings in Suit 197, to conclude that the first defendant had admitted to legal fees owing by Tan Bon Kiat to Messrs Ravi Aida & Partners, which the second and third defendants had agreed to settle, rendering both the first and fourth defendants liable to the plaintiff in this suit, was an appealable error.

Whether There Was Privity Of Contract Between The Defendants And The Plaintiff

[29] The erroneous reliance by the learned SCJ on the pleadings in Suit 197, resulted in her failure to address the issue of privity of contract, the significance of which was laid down in landmark cases such as *Murphy v. Bower* (1866) IR 2 CL 506 and *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 (HL), which have been adopted in a plethora of cases including *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284; *Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534; [1988] 1 MLJ 269; and *Tan Poh Yee v. Tan Boon Thien & Other Appeals* [2017] 3 CLJ 569; [2017] 3 MLJ 244. In fact, in *Tan Poh Yee v. Tan Boon Thien & Other Appeals* (*supra*), Idrus Harun JCA (as he then was), emphasised in the following passage:

> The fundamental principle of law on this point has been constantly followed and repeated by our courts that only a party to a contract can sue on it and only the parties to a contract has enforceable rights and obligations under such contract. We may categorically state, as an extension to this principle, **that no stranger to the consideration can take advantage of a contract**, although made for his benefit.
>
> (emphasis added)

[30] Based on the principle that the doctrine of *jus quaesitum tertio* has no place in the law of contract, it is my view that the learned SCJ had erred in concluding that the first and fourth defendants were liable to pay legal fees that was purportedly owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, and which the second and third defendants had agreed to settle.

[31] In my view, the learned SCJ should have determined the contractual relationship between the parties, bearing in mind that the first defendant in this case appeared to be a third party funder, without any apparent connection or link to Tan Bon Kiat or his dealings with Messrs Ravi Aida & Partners. Considering that such third party funding arrangements are not recognised in this country, the first defendant had no legal obligation to the plaintiff for the legal fees owed by Tan Bon Kiat to Messrs Ravi Aida & Partners, which the second and third defendants had agreed to settle.

[32] It is also pertinent to note that the plaintiff had discontinued/withdrawn his claims against the second and third defendants, leaving the remaining first and fourth defendants, who were strangers to the arrangement, as they were not parties to the arrangement between Messrs Ravi Aida & Partners on one hand and Tan Bon Kiat and the second and third defendants on the other.

[33] As far as the fourth defendant was concerned, I was of the opinion that the learned SCJ had erred in holding that she was liable in view of the fact that she was merely the finance manager of the second defendant, and shareholder and director of the first defendant.

[34] The defendants contended that without lifting the veil of incorporation, the fourth defendant could not be held liable for the acts, if at all, of the first defendant.

[35] On lifting the veil of incorporation, the principles have been distilled by Gopal Sri Ram JCA (as he then was) in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355, which were endorsed subsequently by the Federal Court in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73; and *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719. In *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355, it was stated:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases **where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity**.
>
> (emphasis added)

[36] On the facts of the case, the plaintiff's claim against the fourth defendant was not based on actual fraud or some conduct amounting to fraud in equity, but on the mere fact that she was a shareholder and director of the first defendant, and a former employee of the second defendant. As such, the veil of incorporation of the first defendant remained intact, and could not be lifted to hold the fourth defendant liable.

Whether An Adverse Inference Should Be Drawn For Failure Of The Plaintiff To Call Tan Bon Kiat

[37] The central figure in this arrangement was Tan Bon Kiat, as he was the party who had received legal services provided by Messrs Ravi Aida & Partners, and could explain if the legal fees that he owed Messrs Ravi Aida & Partners had been settled by the second and third defendants.

[38] The defendants had submitted at length, that based on the notes of proceedings in Suit 197, the plaintiff who gave evidence as a witness in Tan Bon Kiat's counterclaim, had contradicted himself in this suit, and that the evidence of Tan Bon Kiat himself indicated that the fees to Messrs Ravi Aida & Partners had already been settled, indicating that the plaintiff's claim in this suit was a double-claim and, therefore, amounted to unjust enrichment. The plaintiff, however, contended that since the notes of proceedings in Suit 197 was marked as ID, no reference whatsoever should have been made to it.

[39] In such circumstances, and bearing in mind that the common denominator in this suit and Suit 197 was Tan Bon Kiat, in my view, he would have been in a position to adduce the best evidence available, as he could have shed light on the amount owing, if any, to Messrs Ravi Aida & Partners. As such, the issue that arose was whether an adverse inference should have been drawn against the plaintiff for failing to call Tan Bon Kiat.

[40] Reference at this juncture was made to illustration (g) of s. 114 of the Evidence Act, which reads:

> Section 114 – court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> ... The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[41] As stated by the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, the evidence that is referred to in s. 114(g) of the Evidence Act must not only be relevant, it must be material.

[42] In my view, Tan Bon Kiat was material to the facts of the present case as he would have been able to lend credence to the narrative provided by the plaintiff in his statement of claim. On this note, reference was made to the case of *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2012] 1 LNS 1116; [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (now FCJ):

> **The person best placed to explain fully the events of the day would have been the Master but the defendant failed to call the master as witness**, stating that he was uncooperative. Given the importance of this witness'

A evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s. 114(g) against the defendant ...

(emphasis added)

B **[43]** A further aspect of the evidence referred to in illustration (g) of s. 114 of the Evidence Act is that an adverse inference is drawn only if there was deliberate withholding of the evidence. Deliberate withholding of the evidence is inferred from the lack of a reasonable explanation for the failure to produce the witness: *Adel Muhd El-Dabbah v. AG of Palestine* [1944] AC C 156, *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139; and *Marappan Muthusamy v. R Sivam Ramasamy* [2013] 1 LNS 1381; [2014] 4 MLJ 428. In the present case, there was no explanation proffered for the absence of Tan Bon Kiat, leading to the inference that there was deliberate withholding of the witness.

D **[44]** As such, the failure to call Tan Bon Kiat resulted in the invocation of an adverse inference against the plaintiff.

Whether The Plaintiff Had Made Any Demand From The Defendants

[45] The plaintiff contended that his invoices became final and payable by E virtue of s. 128 of the Legal Profession Act 1976 ("Legal Profession Act"), which reads:

Section 128 – Order for taxation of advocate and solicitor's bill on notice given

F (1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court.

(2) No such order for taxation shall in any event be made after the expiry G of one year from the delivery of the bill of costs.

[46] As a general rule, a demand for payment is necessary before commencing action. The significance of making a demand was highlighted by the Court of Appeal in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440; [1998] 2 MLJ 613, through Gopal Sri Ram JCA (as he then was), in H the following passage:

So far as authority is concerned, the point is, I think, concluded against the appellant by the decision of the Saskatchewan Court of Appeal in *Anglo-Canadian Mortgage Investment Corp v. Shaw* (1921) 59 DLR 152, the headnote to which reads as follows:

I

If under the terms of an agreement for the purchase of land, *a demand for payment is necessary before commencing action, and if prior to launching a first action the plaintiff has in fact made a demand for payment*

> *but at the trial of that action has failed to prove the demand and the action is dismissed*, a subsequent action will not lie for the same cause, but if in fact no demand has been made, the dismissal of the first action is no bar to recovery in a second action, after demand has been made, because until a demand is made no cause of action exists and any action brought before demand is made is premature.
>
> (emphasis added)

[47] In this case, since reliance was made on s. 128 of the Legal Profession Act, it was, therefore, crucial to note that s. 128 is predicated upon compliance with the requirements of s. 124 of the Legal Profession Act, which reads:

> Section 124 – No advocate and solicitor to sue for costs until delivery of bill of cost
>
> (1) Except as authorised by this Act, no advocate and solicitor shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after **he has delivered to the party** to be charged therewith, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, **a bill of costs, which bill shall be signed either by the advocate and solicitor**, or in the case of a partnership, by any of the partners, either with his own name or with the name or style of the partnership, or by another advocate and solicitor employed by the first-named advocate and solicitor or the partnership, or be enclosed in or accompanied by a letter, signed in the like manner, referring to the bill.
>
> (2) Where a bill is proved to have been delivered in compliance with subsection (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a bill *bona fide* complying with this Act.
>
> (emphasis added)

[48] The requirement for a demand to first be made was emphasised in the cases of *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd* [1999] 1 CLJ 239; [1998] 3 MLJ 753 and *Tetuan Kumar Jaspal Quah & Aishah v. Far Legion Sdn Bhd & Anor* [2003] 1 LNS 178; [2003] 6 MLJ 95, where in the latter case, it was stated by Zulkefli Ahmad Makinudin J:

> Menurut s. 124(1) Akta Profesyen Undang-Undang 1976 ('Akta tersebut') seseorang peguamcara tidak boleh membawa tindakan guaman untuk mendapatkan kos mereka sehingga berakhirnya satu bulan dari tarikh penyampaian bil tersebut kepada anakguamnya. *Penyampaian nota yuran kepada anakguam adalah satu pra-syarat yang perlu dipenuhi sebelum seseorang peguam atau firma peguam boleh memulakan tindakan terhadap anakguam untuk yuran guaman ...*
>
> ...

A ... Adalah jelas peruntukan s. 124(1) Akta tersebut menghendaki penyampaian secara fizikal nota yuran kepada anakguaman. Tujuan sebenar s. 124 Akta tersebut yang *menghendaki seseorang peguamcara menyampaikan secara fizikal nota yuran guaman kepada anakguamnya adalah untuk membolehkan anakguam tersebut dapat mengetahui dengan terperinci butir-butir perkhidmatan* yang telah diberikan oleh peguamcaranya serta amaun
B yang dikenakan bagi perkhidmatan tersebut. Penyampaian nota yuran secara fizikal kepada anakguamnya juga membolehkan anakguam tersebut membuat penilaian secara sendiri atau melalui nasihat profesional samada yuran yang dikenakan oleh seseorang peguamcara itu adalah sejajar dengan perkhidmatan yang telah diberikan oleh peguamcara tersebut dan
C sekiranya anakguam tersebut tidak berpuas hati dengan yuran yang dikenakan beliau boleh merujuk yuran tersebut untuk ditaksirkan oleh mahkamah.

(emphasis added)

[49] The importance of s. 124 of the Legal Profession Act is indisputable.
D It requires a bill of costs to be delivered to the chargeable person before an action can be commenced for the recovery of costs. In the present case, as admitted by the plaintiff himself, no such demand, as required by s. 124 of the Legal Profession Act, had been made against the defendants.

[50] The plaintiff had not tendered any evidence, whether in the form of
E correspondence or otherwise, to show that invoices which purportedly contained the amount of legal fees owed, had been sent by Messrs Ravi Aida & Partners to the defendants, or that any reminder had been issued to the defendants for payment. Since no demand had been made, the plaintiff was not in a position to have initiated this suit against the defendants.

F *Whether The Plaintiff Had Proved His Case On A Balance Of Probabilities*

[51] Based on the Latin maxim *ei incumbit probatis qui dicit, non qui negat*, which means that the burden of proof is on the one who declares, not on the one who denies, the plaintiff had the legal burden to prove his case on a balance of probabilities. The legal burden was imposed on the plaintiff as
G prescribed by ss. 101 and 102 of the Evidence Act, which read:

Section 101 – Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove
H that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

***

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Section 102 – On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[52] This was explained in the case of *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491, where it was stated by Arifin Zakaria CJ in the following passage:

It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

[53] The term "balance of probabilities" was described in *Miller v. Minister of Pensions* [1947] 2 All ER 372 as a probability which is "not so high as required in a criminal case … more probable than not … but if the probabilities are equal, it is not discharged". The standard, therefore, "does now allow for any guesswork, speculation, surmises or conjecture, which is acting on a mere possibility". *Miller v. Minister of Pensions (supra)* has been assimilated into Malaysian jurisprudence *via* numerous cases including *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1.

[54] I found instructive also the case of *Unsung Rasad v. PP* [2019] 1 LNS 662, where the concept of balance of probabilities was explained by Abang Iskandar Abang Hashim JCA (now FCJ), adopting the English case of *Re B* [2008] UKHL 35:

In the celebrated case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:

If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, *to reach a level of proof of at least 51% probability against his adverse party*. We would cite the English case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgment entered in his favour, like so:

If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either

A happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. *If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*.

B

(emphasis added)

[55] The plaintiff, in his submission, claimed that several issues had not been canvassed by the defendants in the Sessions Court. In my view the erroneous reliance by the learned SCJ on the pleadings in Suit 197, resulted C in her failure to address several issues that were crucial in the determination of the plaintiff's claim.

[56] In the final analysis, it was not for the defendants to establish their case. All they were required to do was to raise sufficient evidence to ensure that the probabilities were equal. It was the plaintiff who had to prove his D case on a balance of probabilities. In the present case, the plaintiff was not in a position to initiate this suit in his name only, without naming his partner/s, and on that count, this suit was a non-starter. However, even on the assessment, evaluation and judicial appreciation of the evidence, it was my view that the gaps left in the plaintiff's case rendered it one which had E failed to reach the threshold of proof as required in a civil case. As such, the learned SCJ should have dismissed the plaintiff's claim.

Conclusion

[57] In the upshot, based on the aforesaid reasons, and after judicious F consideration of all the evidence before this court, submissions of both parties, and the grounds of judgment of the learned SCJ, this appeal was allowed with costs.

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